

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738

T 212.965.2200
F 212.226.7592

www.naacpldf.org

Washington, D.C. Office
700 14th Street, NW, Suite 600
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312



By ECF

October 21, 2019

The Honorable Alison J. Nathan
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: *NAACP Legal Defense & Educational Fund, Inc. v. U.S. Dep't of Justice*,
No. 18-cv-9363 (AJN)

Dear Judge Nathan:

We write to notify the Court regarding developments relevant to the above-referenced action brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), in two other FOIA lawsuits implicating the Civil Rights Division (“CRT”) of the U.S. Department of Justice (“DOJ”). Specifically, per court order and concession, DOJ has agreed in these two lawsuits to conduct a search for official government records in the personal email account of Deputy Assistant Attorney General and former Acting Assistant Attorney General for Civil Rights, John Gore—a custodian at the center of this action brought by NAACP Legal Defense & Educational Fund, Inc. (“LDF”).

Broadly speaking, the instant action stems from LDF’s FOIA request seeking records from CRT related to the proposed inclusion of a citizenship status question on the 2020 decennial census.¹ Presently before the Court are two fully briefed motions—Defendant DOJ’s motion for summary judgment² and Plaintiff LDF’s cross-motion for summary judgment³—regarding the sole remaining issue in this litigation: the adequacy of DOJ’s search for records in CRT responsive to LDF’s request. To identify responsive records, CRT searched (a) the immediate office of the Office of the Assistant Attorney General (“OAAG”) and (b) the Voting Section.⁴ Mr. Gore was a custodian in every search that CRT conducted of OAAG records.⁵

¹ See Compl. ¶ 18, ECF No. 1.

² See ECF Nos. 22–28.

³ See ECF Nos. 25–29.

⁴ See Decl. of Tink Cooper ¶¶ 5–7, ECF No. 24 (“Cooper Decl.”).

⁵ See Cooper Decl. ¶¶ 13–16, 18, 22; Suppl. Decl. of Tink Cooper ¶ 8, ECF No. 28.



We wish to notify the Court of developments in two other FOIA matters that suggest that Mr. Gore's records at the agency were not complete at the time of CRT's declared searches. The first matter involves a FOIA case regarding the Presidential Advisory Commission on Election Integrity ("Commission") brought by the Brennan Center for Justice at New York University School of Law and the Protect Democracy Project against DOJ and other defendants ("the Brennan Center litigation").⁶ "Plaintiffs allege[d] that the Commission, established by President Trump to 'promote fair and honest Federal elections' by detecting voter fraud, was really intended to erect legal barriers to voting by eligible citizens. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). Plaintiffs believe[d] that the production of relevant documents may enable them to substantiate their claims."⁷ On April 30, 2019, Judge Hellerstein of this District issued an opinion and order granting plaintiffs' partial summary judgment.⁸ Specifically, and in relevant part, Judge Hellerstein found DOJ was required to search Mr. Gore's private email account because, although he was not a Commission member, he "had received emails from Commission members concerning Commission business, in [his] personal email account[]," and he "also sent emails concerning Commission business to a Commission member at her personal email address."⁹ On June 28, 2019, Judge Hellerstein denied DOJ's motion for reconsideration.¹⁰ As of this writing, no further substantive filings have been made in the Brennan Center litigation.

The second FOIA lawsuit indicates that DOJ is taking corrective actions with regard to Mr. Gore's personal email account. In that matter, Plaintiff American Oversight filed suit regarding a FOIA request to CRT seeking Mr. Gore's external sent email communications.¹¹ On October 15, 2019, DOJ moved to vacate the motion for summary judgment briefing because the agency "reevaluated its position and has consented to conducting a search of Mr. Gore's personal email system given the specific facts of this case."¹²

It is not apparent on the face of DOJ's actions whether any records found would be responsive to LDF's request, nor does Plaintiff at this time seek relief from the Court. Nevertheless, we offer this notification to the extent it informs the Court's consideration of the motions *sub judice*.

We thank the Court for its attention in this matter.

⁶ *Brennan Center for Justice v. U.S. Dep't of Justice*, 17-cv-6335-AKH (S.D.N.Y. filed Aug. 21, 2017).

⁷ *Brennan Center for Justice v. U.S. Dep't of Justice*, 17-cv-6335-AKH, ECF No. 99 at 3 (S.D.N.Y. filed Apr. 30, 2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Brennan Center for Justice v. U.S. Dep't of Justice*, 17-cv-6335-AKH, ECF No. 111 (S.D.N.Y. filed June 28, 2019).

¹¹ *Am. Oversight v. U.S. Dep't of Justice*, 19-cv-265, ECF No. 1 at ¶ 7 (D.D.C. filed Jan. 31, 2019).

¹² *Am. Oversight v. U.S. Dep't of Justice*, 19-cv-265, ECF No. 11 at 1 (D.D.C. filed Oct. 15, 2019).



Respectfully submitted,

/s/Leah C. Aden

Sherrilyn A. Ifill

President & Director Counsel

Janai S. Nelson

Samuel Spital

Aaron Sussman

John Z. Morris

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

40 Rector St., 5th Fl

New York, NY

(212) 965-2200

laden@naacpldf.org

/s/ Austin R. Evers

Austin R. Evers

Executive Director

Cerissa Cafasso (D.C. Bar No. 1011003)*

AMERICAN OVERSIGHT

1030 15th Street NW, B255

Washington, DC 20005

(202) 869-5244

austin.evers@americanoversight.org

cerissa.cafasso@americanoversight.org

**Pro Hac Vice*

*Counsel for Plaintiff NAACP Legal Defense and
Educational Fund, Inc.*

CC: All Counsel of Record (by ECF)